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No. 91-260

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JANET T. METZ, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under Kansas law, a house owned by decedent at the time of his death and bequeathed by him to petitioner in exchange for her care for him during his lifetime is included within his gross estate for federal tax purposes and is therefore subject to the federal estate tax lien.

2. Whether the court of appeals abused its discretion in denying petitioner's post-appeal motion to certify a state law question to the Kansas Supreme Court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 933 F.2d 802. The opinions of the district court (Pet. App. A14-A29, A30-A32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1991. A petition for rehearing and a motion to certify question of law to the Supreme Court of the State of Kansas were denied on July 5, 1991 (Pet. App. A13). The petition for a writ of certiorari was filed on August 12, 1991. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).[1]

[1] Petitioner erroneously cites 28 U.S.C. 1257(3) (1982) (certiorari from state courts) as the jurisdictional basis for certiorari. This section no longer exists, having been revised

STATEMENT

1. In October 1976, petitioner was living in California when she was contacted by D. Otis Metz, the grandfather of her ex-husband. Mr. Metz offered to add a codicil to his will to leave his house in Wichita, Kansas, to petitioner upon his death if "she would return from California with her daughters and move into my home in Wichita, Kansas, to help care for me and my needs so long as I shall live" (Pet. App. A17). Mr. Metz was then 91 years old (*id.* at A3).

Petitioner accepted the offer, sold her house in California, and moved into Mr. Metz's house in Wichita. On November 29, 1976, Mr. Metz executed a codicil to his will to leave the residence to petitioner upon his death. His stated reasons for doing so were his "great love and affection" for her, her relationship to him as the mother of his great-grandchildren, her assistance to his wife in her last illness, and their mutual contractual obligations (Pet. App. A17). Petitioner lived with Mr. Metz at his home in Wichita until his death on March 11, 1980 (*id.* at A16).

The assets of Mr. Metz's estate were valued at $2,986,275.01, which included the Wichita residence, valued at $250,000 (Pet. App. A3-A4). On February 16, 1981, the Internal Revenue Service assessed estate taxes in the amount of $1,042,150.94, which gave rise to a lien for estate taxes on all the property in the estate. The estate made a partial payment of $342,975, and elected, pursuant to 26 U.S.C. 6166, to defer payment of the remaining $699,185.77. The deferred amount was to be paid in ten equal annual installments of $69,918.58, beginning December 11,

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and recodified as 28 U.S.C. 1257(a) by Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662.

1985. From 1981 to 1985, the estate made annual interest payments to the IRS, aggregating $276,670.97, but paid none of the principal owed on the tax liability (Pet. App. A4, A19). In 1985, the probate court authorized distribution of the Wichita residence to petitioner even though it determined that the estate had no other property with which to make payments on the deferred portion of the federal estate tax (*ibid.*).

On January 12, 1987, the IRS accelerated the deferred estate tax payments and demanded the entire amount owed plus penalties and interest (Pet. App. A5). Petitioner then commenced the present action to quiet title in the Wichita residence. The government counterclaimed and sought foreclosure of the estate tax lien (*id.* at A14).

2. In the district court, petitioner contended (Pet. App. A2) that, under Kansas law, she became the equitable owner of the residence in October, 1976, when she agreed to take care of Mr. Metz for life. She therefore asserted that Mr. Metz held only legal title for her benefit and that the estate tax lien did not attach to the residence. The court held, however, that, under Kansas law, the contract between petitioner and Mr. Metz was not enforceable until Mr. Metz's death. Because he held valid legal title at his death, the house was properly included in his gross estate and was therefore subject to the estate tax lien (*ibid.*). Petitioner made no effort to obtain certification of the state law question in the district court.

3. The court of appeals affirmed. The court held that, under Kansas law, the transfer of property by will in exchange for lifetime service does not transfer title when the contract is made and that the transfer of the owner's interest in property occurs only when

the contract is completed by the death of the owner (Pet. App. A8). In reaching this conclusion, the court relied on *State* v. *Mollier*, 96 Kan. 514, 152 P. 771 (1915), in which the Supreme Court of Kansas held that property devised in exchange for lifetime care provided to the decedent was subject to the Kansas inheritance tax (Pet. App. A8-A10). While the Kansas statute in effect at the time *Mollier* was decided was repealed in 1978, the court concluded that the rationale of *Mollier* still applies under Kansas law (*id.* at A10).

4. After the court of appeals entered its decision, petitioner filed a petition for rehearing and a motion to certify the question of state law to the Supreme Court of the State of Kansas. The court of appeals denied the petition for rehearing and the motion to certify without opinion (Pet. App. A13).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The federal estate tax lien applies to all property—whether real, personal, tangible or intangible—in which the decedent owned an interest at the time of his death. 26 U.S.C. 2031(a), 2033, 6324(a). The federal estate tax lien attached to the Wichita residence because, under Kansas law, Mr. Metz was the owner of the residence at the time of his death. *State* v. *Mollier*, 96 Kan. at 518, 152 P. at 772. In *Mollier*, a niece inherited her uncle's property after performing an agreement to reside with him and care for him as long as he lived. The niece argued that the property was not subject to the Kansas inheritance

tax because she had acquired the property pursuant to a contract which she had fully performed when the will took effect. She claimed that the will was merely the means for conveying to her the legal title to property that had already become hers when her uncle died. The Supreme Court of Kansas rejected this argument, holding that Kansas law taxed all property passing by will, rather than by deed or grant. The court noted that, while a contract to devise real estate in consideration for lifetime services "would in a proper case be enforced in equity, the property itself was subject to probate as belonging to the deceased at the time of his death, and was liable for his debts, and * * * these were a lien upon the property prior to any rights of the promisee." *Ibid.*

Although the Kansas estate tax statute then in existence was repealed in 1978, the court of appeals correctly held that the rationale of *Mollier* is still applicable to this case. In 1976, when petitioner agreed to care for Mr. Metz, she acquired, at most, "a vested interest, subject to being defeated by her nonperformance" (*State* v. *Mollier*, 96 Kan. at 519, 152 P. at 773).[2] See *Corbin on Contracts* § 21 (1952). Because Mr. Metz continued to own the property until his death, the federal tax lien attached to the residence.

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[2] The court of appeals correctly observed (Pet. App. A10) that current Kansas inheritance tax law also manifests an intent to tax all property of the decedent. See Kan. Stat. Ann. § 79-1547 (1989) (gross estate includes "all property to the extent of the interest therein of the decedent at the time of his or her death"); *id.* § 79-1551 (gross estate includes property where possession or enjoyment can be obtained only by surviving the decedent and the decedent retained a reversionary interest). See also *In re Estate of Saroff*, 229 Kan. 446, 625 P.2d 458 (1981).

Petitioner errs in contending (Pet. 18, 21) that Kansas rejected the rule of *Mollier* in *Frisbie* v. *Director of Taxation*, 1 Kan. App. 2d 416, 566 P.2d 29 (1977). In *Frisbie*, a Kansas appellate court held that the seller's interest in real estate subject to an installment sale was equitably converted into personalty in certain limited circumstances. An installment contract for the sale of real estate is not analogous to a contract for lifetime services. Moreover, petitioner errs in suggesting (Pet. 18) that a decision of an intermediate appellate court could impliedly overrule the decision of the Kansas Supreme Court in *Mollier*.

In any event, petitioner's contentions concerning Kansas law do not warrant this Court's review.

2. The denial of a motion to certify is reviewable only for abuse of discretion. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391 (1974). Certification is not obligatory, even when there is genuine doubt as to local law. *Id.* at 390-391.

The court of appeals did not abuse its discretion in denying petitioner's belated motion to certify. Tenth Circuit Local Rule 27.1 requires that a request for certification be "filed contemporaneously with the moving party's brief on the merits." The motion to certify in this case was made only *after* the court of appeals' decision and was therefore untimely. See *Armijo* v. *Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988); *New Mexico ex rel. Reynolds* v. *Molybdenum Corp. of America*, 570 F.2d 1364, 1367 (10th Cir. 1978). Moreover, the decision of the Kansas Supreme Court in *State* v. *Mollier* is factually indistinguishable from the present case. Since the Supreme Court of Kansas has provided a definitive an-

swer to the question presented in this case, resort to the certification procedure would not have been appropriate.[3] Although petitioner claims (Pet. 16-17) that *Mollier* is outdated, and that the Supreme Court of Kansas would now reach a different result, she cites no relevant Kansas authority in support of her position.[4]

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[3] Even if the criteria for certification are less stringent in the Fifth Circuit than in other courts of appeals, as petitioner seems to argue (Pet. 11), there is no basis to conclude that the Fifth Circuit would have granted certification in this case. In *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), cert. denied, 429 U.S. 829 (1976), the court of apeals declined to certify a question of state law when the question was not one "in which we are required to 'guess' state law from one or two questionable precedents." 526 F.2d at 275.

[4] Petitioner relies (Pet. 17 n.5) on decisions of other jurisdictions that are distinguishable from the present case. *In re Estate of McLeod*, 105 Wash. 2d 809, 719 P.2d 88 (1986), involved a lifetime services contract similar to that present here, but there was no question in that case whether the property should be included in the gross estate. The question presented, and answered in the affirmative, was whether the obligation to bequeath the property as consideration for the services performed was deductible from the value of that estate as a debt of the decedent. The case of *In re Estate of Vai*, 65 Cal. 2d 144, 417 P.2d 161 (1966), did not involve a contract for lifetime services, but a property settlement agreement in which the husband agreed with his estranged wife to provide in his will for the lifetime support of their daughter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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